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HOWARD J. BRAUN

July 27, 1998

Magalie Roman Salas, Secretary
Federal Communications Commission
Washington, D.C. 20554

Re: MM Docket No. 95-154

Dear Ms. Salas:

On behalf of our clients, Contemporary Media, Inc., Contemporary Broadcasting, Inc., and Lake Broadcasting, Inc., enclosed herewith for filing are an original and 14 copies of their **LICENSEES' PETITION FOR RECONSIDERATION** in the above-referenced matter.

Please direct any inquiries or communications concerning this matter to the undersigned.

Very truly yours,

Howard J. Braun

Enc.

cc: As on Certificate of Service

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	MM DOCKET NO. 95-154
	)	
CONTEMPORARY MEDIA, INC.	)	
Licensee of Stations WBOW, WZZQ, and	)	
WZZQ-FM, Terre Haute, Indiana	)	
	)	
Order to Show Cause Why the Licenses for	)	
Stations WBOW, WZZQ, and WZZQ-FM, Terre Haute,	)	
Indiana, Should Not Be Revoked	)	
	)	
CONTEMPORARY BROADCASTING, INC.	)	
Licensee of Station KFMZ(FM), Columbia Missouri, and	)	
Permittee of Station KAAM-FM, Huntsville, Missouri	)	
(unbuilt)	)	
	)	
Order to Show Cause Why the Authorizations for	)	
Stations KFMZ(FM), Columbia, Missouri, and KAAM-FM,	)	
Huntsville, Missouri, Should Not Be Revoked	)	
	)	
LAKE BROADCASTING, INC.	)	
Licensee of Station KBMX(FM), Eldon, Missouri and	)	
Permittee of Station KFXE(FM), Cuba, Missouri	)	
	)	
Order to Show Cause Why the Authorizations for	)	
Stations KBMX(FM), Eldon, Missouri, and KFXE(FM),	)	
Cuba, Missouri, Should Not Be Revoked	)	
	)	
LAKE BROADCASTING, INC.	)	File No. BPH-921112MH
	)	
For a Construction Permit for New FM Station on	)	
Channel 244A at Bourbon, Missouri	)	

To: The Commission

LICENSEES' PETITION FOR RECONSIDERATION

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July 27, 1998

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SUMMARY

In this Petition for Reconsideration, Contemporary Media, Inc., Contemporary Broadcasting, Inc., and Lake Broadcasting, Inc. (together, the "Licensees"), request reversal of the Commission's Decision, FCC 98-133, released June 25, 1998. The Decision revoked the Licensees' licenses, cancelled their construction permits, and denied their new-station application because of the sexual misconduct of the Licensees' principal, Michael Rice, and alleged misrepresentations by the Licensees. The Licensees urge that these actions are arbitrary and capricious and deny the Licensees fundamental due process and Constitutional rights.

Despite the Licensees' extensive challenge to the Character Policy Statements in their Exceptions under Issue 1 ("Violations of Law"), the Decision has not supplied any justification, required by the Court of Appeals' Bechtel standard, for the Commission's holding that it can legally revoke a license because of non-FCC-related criminal misconduct of a licensee's principal (the "nexus" problem), whether or not that misconduct is "egregious". The Licensees also request reconsideration of the Decision's faulty conclusions that the evidence of mitigation in this case does not "overcome the impact of the felonious criminal activity disclosed in the record" and that "the Licensees were unable to make any significant showing of mitigation".

Next, the Decision mischaracterizes Issue 2 ("Misrepresentation") as being "whether the Licensees' statements that, subsequent to his arrest, Rice was completely excluded from any involvement in the management and operation of the radio stations were misrepresentations". The fatal defects in this mischaracterization are that: (1) the Licensees never undertook to completely exclude Mr. Rice from having any involvement in their stations' activities, only to exclude him from having any involvement in the management, policy, and day-to-day **decisions** involving the stations; and (2) the conduct that Mr Rice is accused of performing without

adequate notice to the Commission was not decision-making conduct. While the above distinctions are subtle, they are fully supported by the record evidence and undercut the Commission's conclusions. The Licensees' §1.65 reports were sufficiently complete and accurate so that they cannot reasonably be classified as misrepresenting facts or lacking candor. Even if Mr. Rice carried out the conversations and activities that are attributed to him by two disgruntled former employees, those conversations and activities were not decision-making and, therefore, do not warrant disqualifying the Licensees under Issue 2.

The Licensees also ask the Commission to reconsider its conclusion that they intended to mislead or deceive the Commission concerning Mr. Rice's role at the stations and had a logical reason or motive to do so. The Licensees' §1.65 reports did not misrepresent facts or lack candor concerning whether Mr. Rice remained excluded from any decision-making role at the stations. Mr. Rice did remain so excluded. Since the Licensees never stated that Mr. Rice was to be completely excluded from all station activities, they should not and cannot be faulted for not reporting Mr. Rice's non-managerial, policy, or decision-making station activities.

Finally, the Licensees submit that revoking the Licensees' authorizations in this proceeding would violate the Excessive Fines Clause of the Eighth Amendment under established Supreme Court case law. See U.S. v. Bajakajian, 66 U.S.L.W.4514, 4518-19 (U.S. June 22, 1998) (civil forfeiture for currency reporting offense was unconstitutional because it is "grossly disproportional to the gravity of the defendant's offense"). The revocations here easily satisfy the "grossly disproportional" test and are therefore unconstitutional. At most, a monetary forfeiture may be levied in this case.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	MM DOCKET NO. 95-154
	)	
CONTEMPORARY MEDIA, INC. Licensee of Stations WBOW, WZZQ, and WZZQ-FM, Terre Haute, Indiana	)	
	)	
Order to Show Cause Why the Licenses for Stations WBOW, WZZQ, and WZZQ-FM, Terre Haute, Indiana, Should Not Be Revoked	)	
	)	
CONTEMPORARY BROADCASTING, INC. Licensee of Station KFMZ(FM), Columbia Missouri, and Permittee of Station KAAM-FM, Huntsville, Missouri (unbuilt)	)	
	)	
Order to Show Cause Why the Authorizations for Stations KFMZ(FM), Columbia, Missouri, and KAAM-FM, Huntsville, Missouri, Should Not Be Revoked	)	
	)	
LAKE BROADCASTING, INC. Licensee of Station KBMX(FM), Eldon, Missouri and Permittee of Station KFXE(FM), Cuba, Missouri	)	
	)	
Order to Show Cause Why the Authorizations for Stations KBMX(FM), Eldon, Missouri, and KFXE(FM), Cuba, Missouri, Should Not Be Revoked	)	
	)	
LAKE BROADCASTING, INC.	)	File No. BPH-921112MH
	)	
For a Construction Permit for New FM Station on Channel 244A at Bourbon, Missouri	)	

To: The Commission

LICENSEES' PETITION FOR RECONSIDERATION

Contemporary Media, Inc. ("CMI"), Contemporary Broadcasting, Inc. ("CBI"), and Lake Broadcasting, Inc. ("LBI," and together with CMI and CBI, the "Licensees"), by their attorneys, pursuant to §1.106 of the Commission's Rules, hereby petition for reconsideration and reversal of the Commission's Decision, FCC 98-133, released June 25, 1998, which affirmed the Initial Decision, 12 FCC Rcd 14254 (ALJ 1997) ("I.D.") of Administrative Law Judge Arthur Steinberg ("ALJ") in this proceeding. The Decision revoked the Licensees' five licenses, cancelled their two construction permits, and denied their one new-station application. For the reasons which

follow, the Licensees urge that the subject authorizations should not be revoked and that, at most, a monetary forfeiture should be levied against the Licensees.

I. PRELIMINARY STATEMENT

1. This Petition presents for reconsideration the questions whether the Commission drew appropriate legal inferences from the adduced facts which, for the most part, remain uncontested, and whether the Commission properly applied the appropriate legal principles thereto. As the Licensees will now demonstrate, the Decision constitutes an arbitrary and unlawful action by the agency, which denied the Licensees fundamental due process and their Constitutional rights. As such, it must be reversed.[1]

2. The Decision imposed the "death penalty" of license revocation upon the Licensees because of the sexual misconduct of their principal, Michael Rice, and the Licensees' alleged misrepresentations to the Commission. But, in doing so, the Commission did not fully consider the thrust of the Licensees' arguments about the unlawfulness of its Character Policy State-ments,[2] or come to grips with the Licensees' showing as to why the amorphous standards stated therein are arbitrary and capricious as applied to the Licensees.

3. Likewise, the Decision wrongfully disqualified the Licensees for alleged misrepresen-tations by either misconstruing or misinterpreting the limited scope of Mr. Rice's consultative

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[1] The Licensees will not separately address each Exception to the I.D. that the Comission either implicitly or explicitly denied. The Licensees expressly reserve the right to raise those matters upon judicial review, if necessary.

[2/] See Character Policy Statement, ("CPS-1"), 102 FCC 2d 1179 (1986), recon. granted in part, 1 FCC Rcd 421 (1986), appeal dismissed sub nom. National Ass'n for Better Broadcasting v. FCC, No. 86-1179 (D.C. Cir. June 11, 1987); and Policy Statement and Order ("CPS-2"), 5 FCC Rcd 3252 (1990), recon. granted in part, 6 FCC Rcd 3448 (1991), partial stay granted, 6 FCC Rcd 4787 (1991), errata, 6 FCC Rcd 5017 (1991), recon. granted in part, 7 FCC Rcd 6564 (1992). CPS-1 and CPS-2, together, shall be referred to herein as "CPS-1&2".

activities at the stations. As will be emphasized below, the Licensees never advised or represented to the agency that Mr. Rice would be totally excluded from involvement in station affairs – only from being involved in management and policy decision-making. What is patent, however, is that the Commission's failure to appreciate these subtle but critical distinctions resulted in flawed reasoning and conclusions in the Decision, all to the Licensees' detriment.

4. Accordingly, this Petition will focus on the salient decisionally significant matters which the Decision either did not fully address or improperly decided. Simply put, for the Commission to strip the Licensees of their authorizations requires more than a cursory legal analysis of the questions presented – especially when the Licensees have had a nearly unblemished record of commendable broadcasting service to their communities for more than 30 years.

II. GROUNDS FOR RECONSIDERATION

5. The Licensees urge that the Decision erred in its treatment of the following issues and that the Commission's conclusions concerning each of them, and its ultimate conclusion, should be reversed:

- CPS-1&2 are arbitrary, capricious, and unlawful as a general matter and as specifically applied to the Licensees under Issue 1 because there is no nexus between Mr. Rice's sexual misconduct and the Licensees' broadcast activities;

- CPS-1&2 do not justify disqualifying the Licensees under Issue 1 because the mitigation standards are inadequately defined, and no weighing criteria are specified. In any event, the Licensees have shown adequate mitigation to remain qualified;

- The Licensees should not be disqualified under Issue 2 for failing to inform the Commission more clearly that Mr. Rice eventually began performing consultative activities at the stations;

- The Licensees never stated that Mr. Rice would be totally excluded from involvement in any station "activities," only that he would be excluded from "any involvement in the managerial, policy, and day-to day decisions" pertaining to the Licensees' stations. Mr. Rice was so excluded;

- The hearing testimony concerning alleged station activities of Mr. Rice does not demonstrate that Mr. Rice had a decision-making role at the stations. The Licensees' CEO and General Managers made their managerial, policy, and day-to-day decisions completely independent of Mr. Rice. Since the Licensees' Section 1.65 reports did not misrepresent facts or lack candor by not describing Mr. Rice's non-decision-making activities, the Licensees should not be disqualified under Issue 2; and

- Revocation of the Licensees' authorizations violates the Excessive Fines Clause of the Eighth Amendment.

III. ARGUMENT

A. CPS-1&2 Are Arbitrary, Capricious, And Unlawful In General And As Applied To The Licensees

6. Under Issue 1 ("Violations of Law") herein, the Decision (¶¶11-16) concluded that the ALJ properly applied CPS-1&2 to the felony convictions of the Licensees' primary principal, Michael Rice, for sexual misconduct and correctly disqualified the Licensees. The Decision emphasized (¶¶11 and 14) that Mr. Rice was guilty of "egregious misconduct" and "heinous crimes characterized by moral turpitude," and it reaffirmed (¶11) without elaboration the view adopted by the Commission in CPS-1&2 that:

> [T]he Commission may lawfully apply its character policies and find a lack of character qualifications without specifically finding a connection between the non-FCC criminal misconduct and the applicant's broadcast activities, and where the criminal behavior is egregious, as it is here, it is also not necessary to find a specific relationship to the applicant's truthfulness.

The Commission concluded its discussion by stating (id.): "We continue to believe these policies are appropriate and are appropriate specifically as applied in this case".

7. The Licensees devoted Paragraphs 7-18 of their Exceptions to challenging CPS-1&2 and demonstrated that the Commission's announced policy of revoking licenses because of non-FCC-related felonious misconduct of a licensee's principal is unlawful where, as here: a) there is no nexus between Mr. Rice's sexual misconduct and the Licensees' broadcast activities, and b) such sexual misconduct has no bearing on the Licensees' propensity to be truthful and compliant

with the Commission's rules and policies. In light of that extensive presentation, the Licensees fully expected that the Decision finally would provide a full-blown elaboration and defense of CPS-1&2. Indeed, as stated in Bechtel v. FCC, 957 F.2d 873, 881 (D.C. Cir. 1992), quoting Pacific Gas & Elec. Co. v. FPC, 506 F.2d 33, 38-39 (D.C. Cir. 1974), "[a]n agency relying on a previously adopted policy statement rather than a rule must be ready to justify the policy `just as if the policy statement had never been issued'". Nevertheless, the Decision has provided no justification for its holding that the Commission can legally revoke a license because of non-FCC-related criminal misconduct of a licensee's principal, whether or not that misconduct is "egregious". The Licensees believe that the Decision's terseness clearly does not satisfy the Bechtel standard and raises three special adjudicatory problems, which the Commission should reconsider.

8. First, the Commission does not present any criteria in the Decision (or in CPS-1&2) for measuring "egregious" misconduct.[3] Indeed, it relies (Footnote 3) upon Alessandro Broadcasting Co., 99 FCC 2d 1 (Rev. Bd. 1984), rev. denied, FCC 85-334 (Comm'n June 28, 1985), aff'd sub nom. New Radio Corp. v. FCC, 804 F.2d 756 (D.C. Cir. 1986), to support the Licensees' disqualification, even though the 70% shareholder and proposed full-time program director of the winning applicant in Alessandro was convicted of second degree murder and served three years in prison.

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[3] The Decision's quotation (¶14) from New York's recent "Megan's Law" case is gratuitious, inflammatory, and irrelevant. Recidivism has never been raised in this proceeding. To the contrary, the Licensees have attempted to introduce evidence of Mr. Rice's rehabilitation, but it has been rejected so far by the ALJ and the Commission (Decision n.3).

9. Second, the Licensees' Exceptions demonstrated that their Constitutional due process rights were violated by disqualification for Mr. Rice's non-broadcast-related felony convictions, and they relied heavily on a seminal court case for the required due process analysis -- Wilkett v. ICC ("Wilkett"), 710 F.2d 861 (D.C. Cir. 1983), later proceedings, 844 F.2d 867 and 857 F.2d 793 (D.C. Cir. 1988). In Wilkett, the Court stated that the primary focus of a licensing inquiry by a Federal regulatory agency should be on a company's record of operations, not its principals' personal lives. Yet, the Commission wholly ignores this principle by making specious factual distinctions between this case and Wilkett. See Paragraphs 10 and 11 below. The Court also ruled that it was "unreasonable" for the ICC to conclude that a company was unfit to conduct motor carrier operations solely because of the agency's view that the sole proprietor's convictions for second degree murder and conspiracy to distribute a controlled substance were indicative of a predisposition on the part of the company to violate ICC rules and regulations; that the fitness of the company and its proprietor were "severable"; and that the ICC erred in equating the two (710 F.2d at 864-65) -- the same error made by the Decision with respect to Mr. Rice and the Licensees.

10. Although the Decision (¶13) briefly discusses Wilkett, it erroneously distinguishes it on the facts and, therefore, mistakenly concludes that Wilkett is not controlling here. The Court of Appeals reversed the ICC's refusal to grant a license in Wilkett knowing that: (1) Wilkett Trucking Company is a sole proprietorship whose sole proprietor, James Wilkett, was serving a 15-year prison term for second degree murder and conspiracy to distribute drugs; (2) prior to his incarceration, Mr. Wilkett normally made his company's day-to-day managerial decisions; (3) his son began managing the business when his father's incarceration started; (4) Mr. Wilkett "calls him from prison daily and they discuss business"; and (5) Mr. Wilkett "still makes some

management decisions". See Wilkett Trucking Co., No. MC-121794 (Sub-No. 7), decided Jan. 18, 1983, slip op. at 1.

11. Thus, the Licensees submit that it is incorrect for the Decision to dismiss Wilkett as a "drug trafficking" case or to imply (Footnote 1) that the FCC may pierce a licensee's "corporate veil" in order to disqualify it for the non-business related misdeeds of its president and sole shareholder (Mr. Rice), even though the Court of Appeals would not allow the ICC to disqualify a licensee for the non-business related murder conviction of its sole proprietor who discusses the business from prison on a daily basis and still makes management decisions. The Licensees submit that their due process rights under Wilkett are not fact-specific, nor does Wilkett's "nexus" requirement apply only to ICC cases.[4]

12. Third, the Licensees' Exceptions pointed to a recent Commission case (The Kravis Co., 11 FCC Rcd 4740 (1996)), involving a licensee principal's felonious sexual misconduct unrelated to its broadcast stations (as here), which reveals not only the irrationality of CPS-1&2 but also the impossibility of applying it fairly and consistently. In Kravis, two radio stations' licenses were renewed without any formal inquiry into the fact that the licensee's president and sole stockholder pled guilty to the felonies of possessing and exhibiting child pornography. Apparently, a Commission hearing was avoided simply because, despite the guilty plea, its principal was adjudicated pursuant to a "deferred judgment procedure," he was placed on

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[4] The Decision (¶13) cites FCC v. WOKO, Inc., 329 U.S. 223 (1946), for the proposition that "[W]here appropriate, the misconduct of one individual may result in the disqualification of the applicant," but in WOKO, the company concealed for many years and in many applications the fact that one Pickard and his family owned 24% of the company's stock. 329 U.S. at 225. This was not the misconduct of "one individual," and it was clearly broadcast-related. Thus, the holding in Wilkett is not inconsistent with WOKO.

probation "without a judgment of guilt," and the charges were to be expunged upon successful completion of probation. Notwithstanding, the Decision (¶12) concludes that there is no inconsistency between Kravis and the instant case, because the Licensees made no showing that the charges were not expunged in Kravis or that "there was any adjudication or conviction for the Commission to consider". Surely this hypertechnical application of CPS-1&2 is erroneous. The Licensees submit that, given CPS-2's declaration (5 FCC Rcd at 3252 ¶4) that "evidence of any conviction for misconduct constituting a felony will be relevant to our evaluation of an applicant's or licensee's character" and CPS-1's statement (102 FCC 2d at 1205 n.64) that a plea of nolo contendere "could be considered relevant for the purposes of our character examination," the fact that Mr. Kravis's guilty plea was eventually expunged does not eradicate his underlying felonious misconduct, and his guilty plea should have been given at least as much weight as a nolo plea. Since it wasn't, the Licensees should not be treated any more harshly for Mr. Rice's sexual misconduct. Thus, disqualification under Issue 1 is unlawful. See Melody Music, Inc. v. FCC, 345 F.2d 730 (D.C. Cir. 1965) (similar situations cannot be treated dissimilarly).

B. If CPS-1&2 Are Lawful, The Licensees Have Proffered Sufficient Mitigation Evidence To Remain Qualified

13. Assuming, arguendo, that CPS-1&2 are lawful in general and as applied to the Licensees, the Licensees request reconsideration of the Decision's erroneous conclusions (¶¶14-16) that the evidence of mitigation herein does not "overcome the impact of the felonious criminal activity disclosed in the record" and that "the Licensees were unable to make any significant showing of mitigation".

14. Initially, the Licensees object to the fact that neither in CPS-1&2 nor anywhere in the Decision does the Commission provide guidance as to the weight to be given to each mitigating factor it recognizes, or a formula for determining what constitutes sufficient mitigation to

overcome the potential adverse effects of a principal's felonious misconduct on a licensee's character qualifications. Thus, although the Decision concludes that the Licensees have failed to present sufficient mitigation evidence, it does not provide any concrete basis for weighing the evidence at hand. Such an amorphous standard plainly is arbitrary and capricious, and the Licensees cannot be held to it. See Bechtel v. FCC, 10 F.3d 875, 887 (D.C. Cir. 1993) (FCC cannot continue to apply arbitrary integration criterion in Comparative Broadcast Policy Statement).

15. Turning to the mitigation factors that the Decision discusses, it is clear that, out of the several factors identified in CPS-1&2, the Commission has given overwhelming dominance to the question of the seriousness of Mr. Rice's misconduct. Indeed, the Decision (¶14) identifies seriousness as the "[f]irst and foremost" mitigation factor. However, nowhere does the Decision or CPS-1&2 explain the primacy of that factor or the calculus by which some or all of the other mitigation factors may balance or outweigh it. Of course, within the confines of the Decision, that kind of discussion appears superfluous, since the Decision declares (¶14) that "all but one of the factors we traditionally consider weigh against the Licensees".

16. The Licensees urge that the Decision impermissibly gives short shrift to their Exceptions to the I.D.'s treatment of all of the mitigation factors, and this matter requires reconsideration. Starting with "seriousness of the offense, " in Paragraph 9 above, the Licensees have already shown the definitional deficiencies in the Commission's use of the term "egregious" to describe Mr. Rice's misconduct. Similarly, the Commission should reconsider the Decision's (¶15) refusal to give mitigation significance to the sentencing judge's determination that Mr. Rice's 84-year sentence should run concurrently so that the maximum time served would be only eight years. Attached hereto as Exhibit A is a July 23, 1998 letter to the Commission from Donald L. Wolff, Esq., Mr. Rice's parole counsel, who states that, under

Missouri law, Mr. Rice is scheduled to be released from prison no later than December 29, 1999 and perhaps as early as April 30, 1999.[5] Since Mr. Rice began his incarceration on September 30, 1994 (I.D. ¶14), apparently he will actually be incarcerated for a total of no more than five and one-quarter years. This further supports the Licensees' contention that, as to "seriousness," some practical meaning must be ascribed to the sentencing judge's issuance of concurrent sentences in Mr. Rice's case and to the fact that the actual time served will be less than six years.

17. The Decision (¶15) further concludes that Mr. Rice's misconduct was willful and repeated over an extended period of time. The Licensees object to the inflammatory misimpressions created by the exaggerated and emotionally-charged description of Mr. Rice's sexual misconduct as involving "the abuse of five children over a five year period" (Decision ¶14). In fact, Mr. Rice was convicted of 12 separate acts of misconduct involving five teenagers between the ages of 13 and 16, which occurred between December 1985 and October 1990. Mass Media Bur. Exh. 1, pp. 14-19.

18. Although the Decision (¶15) gives the Licensees mitigation credit for their "good overall record of FCC rule compliance," it erroneously affirms the ALJ's refusal to allow evidence of the stations' good standing and reputation in the community. While the courts have affirmed the Commission's refusal to consider a station's meritorious programming where it has been found that the station made misrepresentations to the Commission, it was plainly wrong for the ALJ to exclude their evidence herein before he had concluded (albeit erroneously) that any misrepresentations had occurred. This is especially so since that substantial documentary

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[5] The Commission is requested to take official notice of Mr. Wolff's letter, pursuant to §1.106(c) of the Rules, because Exceptions were filed in this proceeding on October 31, 1997, and the facts contained in Mr. Wolff's letter did not occur until after that date.

evidence was expressly proffered in connection with Issue 1, not Issue 2, and was relevant to two CPS-1&2 mitigation factors – community reputation and compliance with Commission rules and policies. The excluded evidence supports full credit for the Licensees under the good standing/community reputation mitigation factor. Likewise, the Decision (¶15) incorrectly affirms the ALJ's refusal to credit any of the four character statements submitted on Mr. Rice's behalf because they make no mention of his felony conviction or express unfamiliarity with the details. No cases are cited for the novel proposition that, in order to be accorded any weight, Mr. Rice's character statements had to affirmatively state awareness of his past misconduct, and adding such a requirement, especially post-hearing in the instant case, is a denial of the Licensees' due process rights.[6] The four statements should be fully credited under the good standing and rehabilitation/good character mitigation factors.

19. Finally, the Decision (¶15) improperly faults the Licensees for allowing Mr. Rice to continue to be sole owner, president, treasurer, and a Board member of the Licensees and to participate in station affairs, and it gives no mitigation credit for Mr. Rice's rehabilitation after his sexual misconduct ceased in October 1990. The Decision is incorrect on both matters.

20. First, the above conclusions erroneously imply that licensee rehabilitation could not occur unless Mr. Rice was banished from every aspect of the stations' operations, or even fired. However, in elaborating on the "preventing future occurrence" mitigation factor in CPS-2, 5 FCC Rcd at 3254 n.4, the Commission cited RKO General, Inc., 5 FCC Rcd 642, 644 (1990), which, in turn, relied upon Central Broadcasting Co., 11 FCC 259, 280-81 ¶¶6-8 (1946). There,

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[6] The four witnesses obviously knew about Mr. Rice's convictions, which were the basis of the revocation proceeding in which they presented their statements, and the Mass Media Bureau opted not to cross-examine any of the four witnesses at the hearing.

the Commission treated a party principal as fully rehabilitated after he completed five more years of meritorious operation of the very station whose license had not been renewed because of his prior misconduct. Thus, whatever post-arrest involvement Mr. Rice may have had at the Licensees' stations (see Section C below), which aided his personal rehabilitation (see Paragraph 25 below), did not violate any Commission rule or policy and should not be held against the Licensees.

21. Second, concerning Mr. Rice's prison rehabilitation, the Decision (n.3) incorrectly affirms the ALJ's refusal to admit evidence that Mr. Rice is required by Missouri law to complete a special Missouri Sexual Offender Program ("MOSOP") before his release. As stated by Mr. Wolff in Exhibit A hereto (see Paragraph 16 above), Mr. Rice is now participating in MOSOP, which he is scheduled to complete in April 1999. Surely that rehabilitation evidence is now timely and probative, and it should be received into evidence and fully credited upon reconsideration. See Alessandro Broadcasting Co., 99 FCC 2d at 11 n.13 (rehabilitation credit given to convicted murderer who received certificate of rehabilitation from state court).

22. In sum, the Licensees maintain that their good record of FCC compliance, the substantial passage of time since Mr. Rice's felonious misconduct occurred, the fact that no other principal knew of, or was involved in, such activity, the reputation of Mr. Rice and the Licensees' stations in their communities, Mr. Rice's rehabilitation, and the Licensees' remedial efforts are all substantial mitigation factors that should overcome the undefined and imprecise weight given by the Decision to the seriousness of Mr. Rice's misconduct. Their combined consideration fully warrants a conclusion upon reconsideration that the Licensees should not be disqualified under Issue 1 because of Mr. Rice's prior criminal misconduct.

C. The Licensees Did Not Misrepresent Facts Or Lack Candor Concerning Whether Mr. Rice Was Excluded From Any Decision-Making Role At The Stations

23. The Decision (¶17) prejudicially sets the stage for incorrectly deciding Issue 2 ("Misrepresentation") in this proceeding by mischaracterizing the issue as "whether the Licensees' statements that, subsequent to his arrest, Rice was completely excluded from any involvement in the management and operation of the radio stations were misrepresentations". The fatal defects in this mischaracterization are that: (1) the Licensees never undertook to completely exclude Mr. Rice from having any involvement in their stations' activities, only to exclude him from having any involvement in the management, policy, and day-to-day **decisions** involving the stations; and (2) the conduct that Mr. Rice is accused of performing without adequate notice to the Commission was not decision-making conduct.

24. While the above distinctions are subtle, the Licensees will now demonstrate that they are fully supported by the record evidence. In short, the Decision and the I.D. both erroneously "convicted" the Licensees of misrepresenting to the Commission what Mr. Rice was actually doing at the stations or failing to ensure that Mr Rice's conduct matched the limitations described in the Licensees' §1.65 reports to the Commission. In reality, the Licensees' §1.65 reports were sufficiently complete and accurate so that they cannot reasonably be classified as misrepresenting facts or lacking candor. Even if Mr. Rice carried out the conversations and activities that are attributed to him by two disgruntled former employees, those conversations and activities were not decision-making and, therefore, do not warrant disqualifying the Licensees under Issue 2.

1. Mr. Rice's Consultative Activities Were Adequately Reported

25. Issue 2 was derived from the Licensees' initial June 14, 1991 §1.65 report to the Commission (Lic. Exh. 1, Appendix G-1) (emphasis added):

> Since Mr. Rice's hospitalization on April 3, 1991, he has had absolutely no managerial, policy, or consultative role in the affairs of the [Licensees] in which he has ownership interests and officer positions....In other words, pending a resolution of the referenced criminal charges, Mr. Rice is being completely insulated and excluded from any involvement in the managerial, policy, and day-to-day decisions involving any of the four licensed stations and three construction permits held by the [Licensees].

After Mr. Rice was released from the hospital in October 1991, his psychiatrists advised him to resume some business activities (Lic. Exh. 1, pp 10-11). The record establishes that in subsequent §1.65 reports, beginning in May 1992 (shortly after Mrs. Cox agreed to allow Mr. Rice to engage in occasional and isolated technical projects for the stations), the Licensees deleted the representation that Mr. Rice had no "consultative" role at the stations and substituted the following language (Lic. Exh. 1, p. 8 and Appendix G-2) (emphasis added):

> There has been no change in Mr. Rice's status with Contemporary....Mr. Rice is no longer hospitalized, but he continues to be treated by his physicians as an outpatient, and he continues to have no managerial or policy role in the affairs of the [Licensees] in which he has ownership interests and corporate positions.

The Decision (¶35) hypertechnically faults the Licensees for not being "fully forthcoming" in disclosing that Mr. Rice had begun limited consultative work and for stating that there was "no change" in Mr. Rice's status when his consultative role began. This conclusion is erroneous and should be reconsidered.

26. Section 1.65(a) of the Rules requires an applicant to file supplementary information whenever information already supplied in an application is "no longer substantially accurate and complete in all significant respects" (emphasis added). Thus, the Licensees' filings must be

viewed in this context. The §1.65 reports and application exhibits, which were filed beginning in June 1991, were voluntary reports pertaining to the pre-trial stages of criminal proceedings against Mr. Rice. The submissions were updated and modified as circumstances warranted (e.g., Mr. Rice's consultative activities following his hospital release in October 1991). The Licensees believed in good faith that their filings were adequate advisories, given the occasional nature of Mr. Rice's consultative work.

27. Under these circumstances, the Decision's conclusion is unsupportable that Mr. Rice's consultative role at the Licensees' stations rendered the Licensees' §1.65 reports untruthful. In retrospect, while the opening phrase in the second §1.65 report quoted in Paragraph 25 above might have stated that "There has been no substantial or significant change in Mr. Rice's status," the fact that the very next sentence states that "Mr. Rice is no longer hospitalized" surely puts the reader on adequate notice that "no change" is intended to refer only to meaningful, substantive changes. Mr. Rice's occasional consultative activities did not materially change the fact that he had been removed from day-to-day decision-making at the stations and had no managerial or policy role, and that removal is all that the Licensees ever undertook in their §1.65 reports. In other words, and contrary to the Decision's mistaken reading (¶35) of the §1.65 reports in the record, the Licensees never stated that "Rice would have absolutely no role or involvement in the affairs of the stations". What the Licensees did state is that Mr. Rice would be excluded from "any involvement in the management, policy, and day-to-day decisions" (emphasis added) of the stations and from any "managerial or policy role". See Paragraph 25 above. This is a very important distinction that the Decision refuses to comprehend.

28. Most importantly, the Licensee submit that Mr. Rice's consultative activities were not inconsistent with the Licensees' representations in their §1.65 reports. Therefore, again contrary to the Decision (¶35), when Mr. Rice commenced his consultative activities, they were indeed

"so insignificant as not to reflect on the continuing accuracy and completeness of the information furnished by the Licensees". Consequently, upon reconsideration, the Decision's conclusion that the Licensees' §1.65 reports misrepresented facts or lacked candor concerning Mr. Rice's consultative role at the Licensees' stations should be reversed as clearly erroneous and contrary to the record evidence.

2. Mr. Rice's Limited Involvement In Other Station Activities Did Not Render The Licensees' §1.65 Reports False

29. The record contains conflicting evidence from six witnesses (Janet Cox, Richard Hauschild, Daniel Leatherman, Kenneth Brown, Leon Paul Hanks, and John Rhea) concerning the extent to which Mr. Rice discussed programming and personnel issues at the Licensees' stations after his hospitalization concluded in October 1991. An unbiased reading of the record as a whole, however, clearly supports the conclusions that Mr. Rice relinquished whatever managerial and policymaking roles he may have had prior to his being hospitalized in April 1991, as the Licensees accurately represented to the Commission. Therefore, the Commission should reconsider the Decision's conclusions (¶¶36-40) that Mr. Rice was "involved" in reportable programming and personnel activities after October 1991, that the Licensees were aware of said involvement, and that the Licensees' failure to report those activities made their §1.65 reports false and lacking candor.

30. Mrs. Cox has functioned as the Licensees' CEO since April 1991. General Managers Hauschild, Brown, and Leatherman have assisted her in managerial decision-making, each overseeing day-to-day management and operation of their respective stations on a full-time basis. The record is uncontroverted that from April 1991, when Mr. Rice was hospitalized for psychiatric care and was excluded from the Licensees' managerial decision-making and consultative processes pursuant to Board resolutions, until his release some six months later, he

was not involved in the Licensees' affairs or operations at all. The record is also clear that Mr. Rice did not participate in the normal oversight functions of station management following his hospital release, such as annual budget meetings, the hiring of General Manager Brown, the retention of David Lange as a program consultant, station sales activities or commercial policies, accounting or billing, determinations of employee salaries, negotiation of employment contracts, negotiation of the building lease for the Licensees' new corporate offices, updating the Licensees' employee policy manual, negotiation of vendor contracts or other contacts with vendors, check-writing (except on rare occasions when his signature was needed to meet banking requirements), borrowing money for the Licensees, or equipment purchases (except under Mrs. Cox's specific direction). Those functions were left strictly to Mrs. Cox.

31. While there was testimony that Mr. Rice made unsolicited comments to Mrs. Cox, Mr. Hanks, and Mr. Rhea about certain employees' performance and music selections, the record evidence convincingly demonstrates that Mrs. Cox, as Vice President and CEO, made management decisions wholly independent of what Mr. Rice may have said -- sometimes consistent with his comments, and at other times inconsistent therewith. Messrs. Hanks and Rhea testified that, from time to time, Mr. Rice gave them directives concerning personnel or programming matters. However, the testimony of Messrs. Leatherman, Brown, and Hauschild firmly supports the conclusion that they managed their respective stations without any input from Mr. Rice and reported exclusively to Mrs. Cox.

32. In light of their prior Exceptions on the issue of witness credibility, the Licensees need not restate their continuing disagreement with the ALJ's view – endorsed by the Decision – that more weight should be given to the testimony of Messrs. Hanks and Rhea than to the testimony of Mrs. Cox and Messrs. Hauschild, Brown, and Leatherman concerning Mr. Rice's activities. However, as to the alleged existence of corroborative evidence supporting the

testimony of Messrs. Hanks and Rhea, the Licensees request reconsideration of the Decision's erroneous conclusion (¶39) that the six memoranda between Mr. Rice and Mr. Leatherman show Mr. Rice's involvement in a managerial role in the affairs of the Licensees. They do not. Five of the memoranda between Messrs. Rice and Leatherman involved the station's physical plant and reflected Mr. Rice's concerns as the landlord of the building that housed the station's studio. In response to the sixth memo, Mr. Leatherman dealt exclusively with Mrs. Cox, not Mr. Rice. The Decision ignores these important distinctions, holding that "the pattern is the same as that with respect to the other activities of Rice give instructions to management officials which are then carried out" (id.). This conclusion is clearly mistaken, since the question at hand is whether Mrs. Cox or the Licensees knowingly misrepresented to the Commission that Mr. Rice had no managerial or policy role related to station operations (as opposed to building-related matters of interest to Mr. Rice as a landlord).

33. Likewise, the Licensees seek reconsideration concerning the significance to be attached to Mr. Rice's three letters in 1993 and 1994 responding to unsolicited inquiries he received regarding sale of a construction permit. Mr. Rice is the sole shareholder of CBI's parent company (CMI), and the letters discussed the potential sale of CBI's Station KAAM-FM permit, a major asset of the company. Contrary to the Decision (¶39), Mr. Rice's responses to the inquiries were not inconsistent with the Licensees' representations that Mr. Rice was severed from their management and operational decisions Being the sole owner of CBI, Mr. Rice's rejection of preliminary inquiries about sale of a CBI construction permit was clearly an ownership decision, not a management decision about the Licensees' operations. Indeed, the distinction between "ownership" and "management" lies at the crux of the Commission's former ownership integration criterion in the Commission's Policy Statement on Comparative Broadcast Hearings, 1 FCC 2d 393, 395-96 (1965). As to Mr. Rice's November 13, 1995 letter to Mrs. Cox

(Bur. Exh. 9), there is no record evidence contradicting Mrs. Cox's testimony that, as Vice President and CEO, she felt no obligation to heed Mr. Rice's suggestions, and she made all of her managerial decisions based upon her own independent judgment.

34. Finally, as to "what the Licensees knew about Mr. Rice's activities and when they knew it," the Licensees emphasize that the Decision did not overturn the I.D.'s conclusion (¶175) that neither Mrs. Cox nor Mr. Hauschild had any personal knowledge of Mr. Rice's purported conversations with, or "directives" to, Messrs. Hanks and Rhea concerning programming and personnel matters. Moreover, the Licensees request reconsideration and rejection, as irrelevant, of the Decision's list (¶40) of Mr. Rice's "involvement in station affairs," which, the Decision claims, should have been reported to the Commission in §1.65 reports. The problem with the list is that it does not reflect managerial or policy decision-making activities by Mr. Rice – merely schmoozing, musings, and intermeddling by him, which – assuming all of the stated activities even occurred – did not rise to the level of reportability, because, as explained in Paragraphs 29-32 above, they did not affect the independent decision-making that was actually being done by Mrs. Cox and Messrs. Leatherman, Brown, and Hauschild. There is simply no basis for the erroneous inference that merely because certain events may have happened after Mr. Rice allegedly spoke to Mr. Rhea or Mr. Hanks, they necessarily happened because of those alleged conversations. In other words, there is no record evidence for the proposition that Mr. Rice's purported conversations and other station activities actually dictated any of the Licensees' ultimate programming, personnel, or other management or policy decisions. Under all of these circumstances, it is plainly wrong for the Decision to conclude (¶40) that Mrs. Cox and the Licensees had knowledge of, should have reported, and failed to disclose managerial or policy decision-making activities of Mr. Rice. The fact is that there weren't any to report, and Mr. Rice's other non-decision-making station activities were not required to be reported.

35. In sum, upon reconsideration, the Licensees should be exonerated under Issue 2, because the question is not whether Mr. Rice actually gave any "directives" to Mr. Hanks or Mr. Rhea after October 1991, but rather: (1) whether those purported "directives" were decision-making activities; (2) whether they were heeded by the Licensees' true decision-making personnel (Mrs. Cox and her General Managers); and (3) whether the Licensees were aware of any truly decision-making activities of Mr. Rice and intentionally misrepresented the absence of same in their §1.65 reports to the Commission. The Licensees submit that a careful and objective reading of the record evidence shows that the correct answers to these three questions are "no," "no," and "no". In its zeal to detect false reporting, the Decision has erroneously grasped at straws – a word here or there, an aspersion cast upon Mr. Rice by a disgruntled former employee, etc. Surely disqualifying a licensee and revocation of seven authorizations must be made of sterner stuff.

3. The Licensees Did Not Intentionally Mislead The Commission And Had No Motive To Deceive

36. "Intent to deceive" is a necessary element in proving either misrepresentation or lack of candor in Commission proceedings. See Fox River Broadcasting, Inc., 93 FCC 2d at 129 ¶6. Likewise, "intent to deceive" implies deliberateness. See Reding Broadcasting, Inc., 69 FCC 2d 2201, 2207 (Rev. Bd. 1978). The Commission should reconsider its conclusion (Decision ¶40) that the Licensees intended to mislead or deceive the Commission concerning Mr. Rice's role at the stations and had a logical reason or motive to do so, since there is no credible record evidence justifying such a conclusion.

37. The Licensees have already fully demonstrated that their §1.65 reports did not misrepresent facts or lack candor concerning whether Mr. Rice remained excluded from any decision-making role at the stations. As reported, he did remain so excluded. And since the